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IN THE
COURT OF APPEALS OF INDIANA

IN RE MATTER OF:	)	
	)	
JELON E. SWOPE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A05-0706-CV-297
	)	
DEBBY S. SWOPE,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
The Honorable Christina J. Miller, Magistrate
Cause No. 45C01-0508-DR-614

June 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BROWN, Judge

Jelon E. Swope appeals the trial court's order as to division of assets in the dissolution of his marriage to Debby S. Swope. Jelon raises two issues, which we consolidate and restate as whether the trial court abused its discretion in the valuation and division of marital property. We affirm in part and remand in part.

The relevant facts follow. Jelon and Debby were married on July 18, 1992, and have three children. On August 14, 2005, they separated, and Debby and the children moved to a shelter for victims of domestic violence. The following day, Jelon withdrew $16,000 from a bank account that had been acquired during the parties' marriage. On August 19, 2005, Jelon petitioned for dissolution of marriage.

Jelon did not disclose his withdrawal of the $16,000 or the existence of the bank account when he and Debby exchanged financial declaration forms. Jelon was $2,265.22 behind in child support payments previously ordered by the trial court. The parties had also delayed paying for appraisals of real property they owned jointly, and could no longer afford a guardian ad litem. When Debby subpoenaed Jelon's bank records and discovered that he had withdrawn the $16,000 from the bank account, she filed a Verified Petition for Restraining Order Against Dissipation of Withheld Asset on July 12, 2006.

At the hearing on Debby's petition for a restraining order, Jelon claimed that he used the money to pay his attorney, to pay Debby's attorney, and to repair a "leaky

basement" at the marital residence. Transcript at 144. Debby presented evidence that the basement had been repaired two months before Jelon withdrew the money. The trial court, noting that Jelon had previously denied the existence of the bank account, stated that it was "unconvinced" by Jelon's claims and granted Debby's petition. Id. at 149. The trial court ordered Jelon to "beg, borrow, or steal" $16,000 and deposit it in his attorney's account. Id. at 151. Jelon deposited $6,000 in the Trust account of his attorney and made additional payments totaling $700 into the account. Debby later received $2,500 in child support.

In September and October 2006, the trial court conducted final hearings, after which, on January 22, 2007, it issued a decree of dissolution containing findings of fact and conclusions thereon. The trial court granted Debby sole custody of the three children, awarded Jelon two vehicles, and awarded Debby a vehicle. The trial court also divided their personal property and ordered Jelon to list the marital residence and an apartment building for sale, with the proceeds to be divided between them. The trial court's decree also awarded Debby:

> [T]he entire balance in the [bank account], such sum being $16,000 as a result of [Jelon's] failure to disclose this asset in the course of discovery, and as a result of his conduct throughout the trial of this matter. Such sum is to be paid in part from the remaining funds in the Trust Account of [his attorney] and the balance paid from [Jelon's] share of the marital residence as set forth below. The Court credits [Debby] with the $2,500 payment authorized by this Court and enters Judgment in the net sum of $13,500.00 in favor of [Debby] and against [Jelon], again such sum to be paid from the remaining proceeds held in trust and from [Jelon's] share of the sale of the parties' real property.

Appellant's Appendix at 15. Jelon filed a motion to correct errors, which was denied.

The trial court here entered findings of fact and conclusions thereon sua sponte. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings of fact support the trial court's conclusions of law. Id.

Findings will only be set aside if they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

The issue is whether the trial court abused its discretion in the valuation and division of marital property. Jelon challenges the trial court's finding that he dissipated a marital asset. He also argues that the trial court abused its discretion by compensating Debby for "pre-separation dissipation of marital assets." Appellant's Brief at 7.

The disposition of marital assets is within the sound discretion of the trial court. Hatten v. Hatten, 825 N.E.2d 791, 794 (Ind. Ct. App. 2004), trans. denied. "When a party challenges the trial court's division of marital property, he must overcome a strong

presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." Id.

When we review a claim that the trial court improperly divided marital property, we must decide whether the trial court's decision constitutes an abuse of discretion. Id. We consider only the evidence most favorable to the trial court's disposition of the property, and we do not reweigh the evidence or assess the credibility of witnesses. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. Id. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. Id.

By statute, the trial court shall divide the property of the parties in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Id. (citing Ind. Code § 31-15-7-4). An equal division of marital property is presumed to be just and reasonable. Id. (citing Ind. Code § 31-15-7-5). This presumption may be rebutted by a party who presents relevant evidence, including evidence of the following factors:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
(2) The extent to which the property was acquired by each spouse:
    (A) before the marriage; or
    (B) through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
(5) The earnings or earning ability of the parties as related to:
(A) a final division of property; and
(B) final determination of the property rights of the parties.

Ind. Code § 31-15-7-5. We will address each of Jelon's contentions separately.

A. Dissipation

Jelon challenges the trial court's finding that he dissipated a marital asset. Factors to consider in analyzing whether dissipation of marital assets has occurred include:

1) whether the expenditure benefited the marital enterprise or was made for a purpose entirely unrelated to the marriage;

2) whether the transaction was remote in time and effect or occurred just prior to the filing of a divorce petition;

3) whether the expenditure was excessive or de minimis; and

4) whether the dissipating party had the intent to hide, deplete or divert the marital asset.

Kondamuri v. Kondamuri, 852 N.E.2d 939, 952 (Ind. Ct. App. 2006).

Our review of the record reveals that Jelon withdrew the $16,000 from his account just one day after the parties separated and four days before he petitioned for dissolution of marriage. Thus, Jelon withdrew the money just prior to filing the petition and then, by his own admission, spent it. Furthermore, as the parties were unable to afford a guardian ad litem during the proceedings or to pay for appraisals of real property in a timely manner, the amount of money he withdrew was excessive. Although Jelon claimed that

he used part of the money to fix the basement of the marital estate, the trial court noted that Jelon had previously denied the existence of the bank account and stated that it was "unconvinced" by Jelon's claims. Transcript at 149. Thus, the trial court implicitly found that Jelon had withdrawn the money for a purpose unrelated to the marriage and that he intended to divert it, and we cannot reweigh the evidence or judge the credibility of witnesses on appeal. See Hatten, 825 N.E.2d at 794. Further, despite the trial court's clear directive, Jelon deposited only a total of $6,700 into the Trust account. Application of the factors to the evidence in this case supports the trial court's finding that Jelon dissipated a marital asset, and we cannot say that this finding was clearly erroneous. See, e.g., Kondamuri, 852 N.E.2d at 953 (holding that the evidence supported the trial court's finding that husband dissipated marital assets).

B. Compensation

Jelon also argues that the trial court abused its discretion by compensating Debby for "pre-separation dissipation of marital assets." Appellant's Brief at 7. In support of his argument, he relies on Pitman v. Pitman, 721 N.E.2d 260 (Ind. Ct. App. 1999), trans. denied.

In Pitman, Husband transferred two shares of stock to family members, each share for one dollar, even though the stock was valued at $80,000 a share. 721 N.E.2d at 263, 265. Shortly thereafter, Wife filed a petition for dissolution of marriage. Id. The parties agreed by stipulation upon the division of property, and the trial court, to "equalize" the division of marital property, ordered that Wife receive a judgment of $100,000 in compensation for Husband's dissipation of the stock shares. Id. On appeal, Husband

argued, in part, that the trial court erred in granting Wife a monetary judgment against Husband as compensation. Id. at 266. We held that:

> Under Ind. Code § 31-15-7-4, a marital estate subject to division includes property acquired by either spouse "prior to final separation of the parties." Final separation refers to the date of filing of the petition for dissolution of marriage. Harris v. Harris, 690 N.E.2d 742, 745 (Ind. Ct. App. 1998). Here, Husband acquired the shares of stock during the parties' marriage but sold them prior to the filing of the petition for divorce. Therefore, the shares of stock were not part of the marital estate at the time the petition was filed, and their value was not subject to distribution as marital assets. See id. (holding that husband's pension plan was properly excluded from the marital estate). Furthermore, an examination of the marital estate reveals that the judgment granted to Wife exceeds the value of the portion of marital property that was awarded to Wife. Therefore, Wife's monetary judgment was not based upon an award of marital property but was instead an award to compensate Wife for the loss of the shares of [] stock. The monetary judgment disregards the principle that "a trial court may not compensate a party for pre-separation dissipation," and the award of that judgment was an abuse of discretion. [In re Marriage of] Sloss, [526 N.E.2d 1036, 1040 (Ind. Ct. App. 1988)]; see also [In re Marriage of] McManama, [272 Ind. 483, 487, 399 N.E.2d 371, 373 (Ind. 1980)]. Consequently, we must reverse the judgment of the trial court on this point. See McManama, 272 Ind. at 487, 399 N.E.2d at 373.

Id. at 266-267 (footnotes omitted). We concluded that the proper remedy for pre-separation dissipation of marital assets was for the trial court to depart from the statutory presumption in favor of an equal division of marital property. Id. at 267; Ind. Code § 31-15-7-5.

In the present case, the trial court's order awarded Debby:

> [T]he entire balance in the [bank account], such sum being $16,000 as a result of [Jelon's] failure to disclose this asset in the course of discovery, and as a result of his conduct throughout the trial of this matter. Such sum is to be paid in part from the remaining funds in the Trust Account of [his attorney] and the balance paid from [Jelon's] share of the marital residence as set forth below. The Court credits [Debby] with the $2,500 payment authorized by this Court and enters Judgment in the net sum of $13,500.00

> in favor of [Debby] and against [Jelon], again such sum to be paid from the remaining proceeds held in trust and from [Jelon's] share of the sale of the parties' real property.

Appellant's Appendix at 15. The record does not indicate the value of Jelon's share of the real property. Thus, we are unable to determine whether the $13,500 was an award of marital property or an award to compensate Debby, the latter of which would violate Pitman.

If the value of the trust account and Jelon's share of the real property exceeds $13,500, the trial court, in essence, ordered that Debby receive a larger portion of the marital estate in light of the dissipated asset.[1] Insofar as the order does not provide for Jelon to make payments to Debby beyond these proceeds or beyond the extent of the marital estate, it does not violate Pitman.

However, to the extent that the judgment against Jelon exceeds the value of the trust account and the proceeds from Jelon's share of the real property, it also exceeds the value of Debby's portion of the marital estate and, thus, violates Pitman. Because the order is unclear in this regard, we remand for clarification.

For the foregoing reasons, we affirm the trial court's valuation and division of marital property in part and remand in part for clarification.

Affirmed in part and remanded in part.

NAJAM, J. and DARDEN, J. concur

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[1] The conduct of the parties during the marriage as related to the disposition or dissipation of their property is a statutory factor, evidence of which may be used to rebut the presumption in favor of an equal division of marital assets. See Ind. Code § 31-15-7-5(4).